

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository))

) Docket No. 63-001
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)
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CLI-13-08

MEMORANDUM AND ORDER

On August 13, 2013, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision granting a writ of mandamus, and directing the NRC to resume the licensing process for the Department of Energy's Yucca Mountain high-level radioactive waste repository construction authorization application.¹ We issued an order seeking comment from the participants in this adjudication as to how the agency should continue with the licensing process.² Today we detail the course of action we have selected.

As discussed below, we direct the NRC Staff to complete and issue the Safety Evaluation Report (SER) associated with the construction authorization application. The

¹ See generally *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), *reh'g en banc denied* (Oct. 28, 2013).

² Order (Soliciting Views from Participants) (Aug. 30, 2013) (unpublished) (August 30 Order).

Secretary of the Commission and other appropriate staff also should enter the Licensing Support Network (LSN) documents in the possession of the Secretary into the NRC's official recordkeeping system, the Agencywide Documents Access and Management System (ADAMS), to facilitate the Staff's work on the SER and to prepare for allowing public access to all documents. We further request that the U.S. Department of Energy (DOE) prepare the supplemental environmental impact statement (EIS) that the Staff has determined is needed for purposes of the review of this application under the National Environmental Policy Act (NEPA). Finally, we continue to hold this adjudication in abeyance and will defer decisions related to LSN reconstitution and case management pending completion of the tasks described above.

I. BACKGROUND

By letter dated June 8, 2008, DOE submitted an application seeking authorization to construct a geologic repository at Yucca Mountain in Nye County, Nevada.³ The Staff accepted the application for review⁴ and thereafter published a notice of hearing on the application, providing an opportunity to file intervention petitions with respect to the application.⁵ The notice of hearing included the Staff's determination to adopt, with further supplementation, DOE's 2002 final environmental impact statement (EIS) and 2008 Repository Supplemental EIS.⁶

³ Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); Yucca Mountain; Notice of Receipt and Availability of Application; Correction, 73 Fed. Reg. 40,883 (July 16, 2008).

⁴ Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

⁵ In the Matter of U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave To Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008); CLI-08-25, 68 NRC 497 (2008) (Notice of Hearing).

⁶ The Staff concluded that neither the 2002 EIS nor the 2008 EIS adequately addressed the environmental impacts on groundwater, or from surface discharges of groundwater, associated with the proposed action. Notice of Hearing, 73 Fed. Reg. at 63,029. See U.S. Nuclear

(continued . . .)

We received a number of intervention petitions, and litigation commenced pursuant to 10 C.F.R. Part 2, Subpart J, continuing through 2011.⁷ As relevant here, in March 2010, DOE filed a motion to withdraw its construction authorization application.⁸ The Board denied DOE's motion on June 29, 2010, and found that there was no provision in law allowing DOE to withdraw the application, once filed.⁹ During this time period, Congress reduced funding for the NRC's review of the application, with no funds appropriated for fiscal year 2012. In September 2011, we announced that we were "evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision."¹⁰ We directed the Board, in recognition of budgetary limitations, to "complete all necessary and appropriate case management activities,

Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain (Sept. 5, 2008) (ADAMS accession no. ML082420342) (EIS Adoption Determination Report). See *generally* 10 C.F.R. § 51.109(a)(1) (directing the staff's adoption determination to be included in the notice of hearing). The Staff also adopted DOE's 2008 Rail Alignment EIS and 2008 Rail Corridor Supplemental EIS, neither of which is at issue here.

⁷ A list of key documents detailing the history of the proceeding may be found in an appendix to the Board's decision suspending the proceeding, discussed *infra*. See LBP-11-24, 74 NRC 368, 371-79 (2011). See *generally* 10 C.F.R. pt. 2, subpt. J, "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository."

⁸ *U.S. Department of Energy's Motion to Withdraw* (Mar. 3, 2010). Prior to filing its motion, DOE requested, and the Construction Authorization Board granted, an interim suspension of discovery and a stay of the adjudication pending resolution of its motion to withdraw. See Order (Granting Interim Suspension of Discovery) (Feb. 2, 2010) (unpublished); Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

⁹ LBP-10-11, 71 NRC 609 (2010). In that decision, the Board also granted the intervention petitions of the States of South Carolina and Washington; Aiken County, South Carolina; the Prairie Island Indian Community; and the National Association of Regulatory Utility Commissioners (NARUC). *Id.* at 649.

¹⁰ CLI-11-7, 74 NRC 212, 212 (2011).

including disposal of all matters currently pending before it.”¹¹ Accordingly, the Board suspended the proceeding.¹²

As noted above, earlier this year the D.C. Circuit granted a request for a writ of mandamus and ordered the NRC to “promptly continue with the legally mandated licensing process” for the Yucca Mountain application, “unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining.”¹³ Shortly thereafter, we received requests for action from Nye County and the State of Nevada.¹⁴ In carrying out the court’s order, we sought the participants’ “views as to how the agency should continue with the licensing process.”¹⁵

¹¹ *Id.*

¹² See LBP-11-24, 74 NRC at 370.

¹³ *Aiken County*, 725 F.3d at 267. Nevada sought rehearing *en banc*, and requested that we “postpone any decision regarding how the licensing process should be resumed” until resolution of its petition for rehearing. *State of Nevada’s Comments in Response to the Secretary’s August 30, 2013 Order* (Sept. 30, 2013), at 1 (Nevada Views). Nevada’s petition was denied on October 28, 2013; its request is therefore now moot. See note 1, *supra*.

¹⁴ See *Nye County’s Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders* (Aug. 23, 2013) (Nye County Motion), and *Points and Authorities in Support of Motion* (Aug. 23, 2013) (identical motions filed before the Commission and the Atomic Safety and Licensing Board) (supported by the States of South Carolina and Washington, Aiken County, and NARUC) (Nye County Points and Authorities); *State of Nevada Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding* (Aug. 23, 2013) (supported by Clark and Inyo Counties) (Nevada Motion). Nye County requests that we (1) re-start the licensing proceedings; (2) convene a case management conference to revise the schedule and re-institute discovery; and (3) direct the immediate release of the SER. Nye County Motion at 1. Nevada requests that: (1) the LSN be reconstituted; (2) any required hearings take place in the Las Vegas area; and (3) the restarted adjudication be conducted by Construction Authorization Board 04. Nevada Motion at 3. Each of these issues is addressed in the context of the participants’ views, *infra*. The motions are granted in part as discussed herein, and otherwise denied.

¹⁵ August 30 Order at 1. That Order provided for these views to be combined with any answers to the Nye County and Nevada motions. *Id.* In the meantime, the Nuclear Energy Institute filed an answer to the motions, also on August 30. See *Nuclear Energy Institute’s Answer to Motions Concerning Resumption of Yucca Mountain Licensing Activities* (Aug. 30, 2013) (NEI Answer).

We received views from DOE, the NRC Staff, Nevada (joined by Inyo and Clark Counties, the Timbisha Shoshone Tribe, and the Native Community Action Council), the Nuclear Energy Institute (NEI), Nye County (joined by South Carolina and Washington, Aiken County, and NARUC), the Four Nevada Counties, White Pine County, the Prairie Island Indian Community (PIIC), Lincoln County, and Eureka County.¹⁶ In addition to joining Nevada, the Timbisha Shoshone Tribe, through the Timbisha Shoshone Tribal Council, filed a motion seeking other relief.¹⁷

¹⁶ See *U.S. Department of Energy's Response to the Commission's August 30, 2013 Order* (Sept. 30, 2013) (DOE Views); *NRC Staff Response to August 30 Commission Order* (Sept. 30, 2013) (Staff Views); *Nevada Views*; *Nuclear Energy Institute's Response to Commission's Order Regarding Resumption of Yucca Mountain Licensing Activities* (Sept. 30, 2013) (NEI Views); *Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory [Utility] Commissioners Consolidated Response to NRC Order of August 30, 2013 and to Other Parties' Submittals* (Sept. 30, 2013) (Nye County Views); *Churchill County, Esmeralda County, Lander County and Mineral County ("The Four Nevada Counties") Views as to How the NRC Should Continue the Yucca Mountain Licensing Process* (Sept. 30, 2013) (Four Counties Views); *White Pine County, Nevada Views Regarding How NRC Should Continue the Yucca Mountain Licensing Process* (Sept. 25, 2013) (White Pine County Views); *Prairie Island Indian Community's Response to the Commission's August 30, 2013 Order* (Sept. 30, 2013) (PIIC Views); *Lincoln County, Nevada Views Regarding How NRC Should Continue the Yucca Mountain Licensing Process* (Sept. 26, 2013) (Lincoln County Views); *Eureka County's Response to NRC Secretary's August 30, 2013 Order* (Sept. 30, 2013) (Eureka County Views).

In addition, we received several limited appearance statements. See Treichel, Judy, Nevada Nuclear Waste Task Force, letter to the Commissioners, "Yucca Mountain licensing database (Licensing Support Network)" (Sept. 6, 2013); Treichel, Judy, Nevada Nuclear Waste Task Force, e-mail to Mary Woollen, Office of the Chairman, "New US Nuclear Waste Technical Review Board Report" (Sept. 23, 2013); Hoffman, Donald R., American Nuclear Society, Letter to Chairman Macfarlane, (Sept. 30, 2013); Case, John B., JBCase and Associates, letter to Eliot Brenner, Office of Public Affairs, "Nuclear Regulatory Commission Seeks Input on Resumption of Yucca Licensing Review No. 13-070" (Sept. 19, 2013); Ewing, Early, e-mail to the Secretary of the Commission (Sept. 4, 2013). These statements will be included on the docket of this proceeding. See *generally* 10 C.F.R. § 2.315(a).

¹⁷ *Timbisha Shoshone Tribe's Response to NRC Secretary's August 30, 2013 Order and Renewed Motion for Recognition of the Timbisha Shoshone Tribal Council as the Legitimate Representative of the Timbisha Shoshone Tribe* (Sept. 30, 2013) (Tribe Views and Renewed Motion). The renewed motion states that the Timbisha Shoshone Tribal Council stands in the shoes of Joint Timbisha Shoshone Tribal Group, a single entity formed for the purposes of the Tribe's participation in the adjudication. *Id.* at 4. See *generally* Order (Accepting Joint

(continued . . .)

II. DISCUSSION

We undertake today's decision as an exercise of our inherent supervisory authority over agency proceedings, as we do when a matter is not strictly adjudicatory in nature or otherwise does not fit cleanly within the procedures described in our rules of practice.¹⁸

A. The Participants' Views

We have reviewed the participants' submissions as well as information regarding the projected costs of licensing activities. Common themes emerge from our review: all participants request that we direct the NRC Staff to complete the Safety Evaluation Report associated with the application, although the views as to the appropriate sequencing of SER completion in relation to other activities vary among the participants.¹⁹ The Staff also recommends that the agency complete the supplemental EIS.²⁰ Several participants seek reconstitution of the LSN;²¹ others disfavor LSN reconstitution, but request that the LSN document collection be made

Representation of Timbisha Shoshone Tribe) (Apr. 22, 2009) (unpublished). In today's decision, we refer to the movant as the "Tribal Council."

¹⁸ See, e.g., *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-6, 78 NRC ___ (Aug. 5, 2013) (slip op.) (responding to judicial remand); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002).

¹⁹ See, e.g., Staff Views at 7, 8-10; Nevada Views at 8 (complete SER in parallel with reconstitution of the LSN); Nye County Points and Authorities at 16-17, and Nye County Views at 1, 3-12 (requesting immediate issuance of the SER "with the Staff safety conclusions intact"); NEI Answer at 2, 4-5; NEI Views at 1-2; PIIC Views at 2 (listing completion and publication of the SER "as the first priority for the expenditure[] of funds"); Four Counties Views at 1-2; White Pine County Views at 3; Lincoln County Views at 3; Eureka County Views at 4-5 (advocating issuance of SER only if sufficient funds are available to conduct a hearing).

²⁰ Staff Views at 7, 10-11.

²¹ Nevada Motion at 3-8 ("Nevada's strong preference is that the LSN be reconstituted as it previously existed—a stand-alone internet page fully available for public access and search"); Nevada Views at 2, 5-8 (LSN reconstitution in conjunction with SER completion); Eureka County Views at 1, 4, 5 (restoration of the LSN following resumption of the adjudication).

available in some other format.²² A number of participants seek resumption of this adjudication and make related requests, including re-establishment of Construction Authorization Board 04, conduct of a conference in the Las Vegas area, resumption of Phase I discovery,²³ and other requests related to case management.²⁴ In contrast, other participants caution against resumption of the adjudication, expressing doubt as to whether available funds would be sufficient to make meaningful progress.²⁵ DOE recommends no particular course of action but represents that it is “committed to complying as expeditiously as possible with any NRC order, subject to the availability of funds.”²⁶

²² NEI Answer at 6-7; Nye County Points and Authorities at 18; Nye County Views at 19-21; Four Counties Views at 2 (recommending, instead, that “all documents in the proceeding be added to the ADAMS archival system”); White Pine County Views at 3 (encouraging the NRC to “utilize existing document archival systems . . . in lieu of reconstituting the costly and cumbersome [LSN]”), 4; PIIC Views at 2 (seeking to delay reconstitution of the LSN until after a case management conference and completion of the SER, and recommending that the NRC “make all documents filed and archived in the proceeding available on the NRC’s ADAMS archival system”); Lincoln County Views at 4 (unnumbered) (recommending placement of documents provided to the NRC “on the NRC’s existing ADAMS document archival system”).

²³ In view of the Staff’s plan to issue the SER serially, the Board planned discovery to occur in phases. So-called “Phase I” discovery comprised (1) all safety and miscellaneous contentions concerning issues relating to either SER Volumes 1 or 3 (regarding general information and review of repository safety after permanent closure, respectively); (2) all NEPA contentions (other than those involving DOE’s additional groundwater analysis) relating to SER Volumes 1 or 3; and (3) all “legal issue” contentions relating to SER Volumes 1 or 3. See CAB Case Management Order # 2 (Sept. 30, 2009) (unpublished), at 3-4 & app. (identifying specific contentions to be addressed in Phase I) (Case Management Order # 2); *NRC Staff Answer to the CAB’s July 21, 2009 Order Concerning Serial Case Management* (July 28, 2009) (providing information on the subject matter of each of the five SER volumes) (Staff Answer Concerning Serial Case Management).

²⁴ Nevada Motion at 8-11; Nevada Views at 8-12, 13 (taking the position that discovery cannot be accomplished without reconstitution of the LSN and completion of the SER); Nye County Points and Authorities at 10, 14-15; Nye County Views at 2-3, 12-16, 21-22; Eureka County Views at 1, 3-4, 5; Four Counties Views at 1; White Pine County Views at 3, 4; PIIC Views at 1, 2; Lincoln County Views at 1-2.

²⁵ Staff Views at 11-17; NEI Answer at 6, 7. White Pine County seeks consideration of funding issues affecting it and, potentially, other participants. White Pine County Views at 2-3.

²⁶ DOE Views at 2 (unnumbered).

B. Course of Action for the Licensing Process in the Near Term

As an initial matter, we explain several principles that guide our approach, which we consider to be consistent with the court’s direction in *Aiken County* and with our obligations under the Nuclear Waste Policy Act (NWPA). First, the court directed the agency to “promptly continue” the licensing process, but it did not prescribe any particular task or sequence of tasks. Second, the court recognized that the agency currently has limited funding to continue the licensing process.²⁷ The court’s decision does not require (or permit) us to expend funds beyond the agency’s existing Nuclear Waste Fund appropriation.²⁸ The court’s order therefore afforded us broad discretion in choosing a pragmatic course of action to resume the licensing process.²⁹

Our decision today is not intended to permanently change the course of this licensing process. Consistent with our rules, before a final decision approving or disapproving a construction authorization application may be reached, not only must the Staff complete its safety and environmental reviews but a formal hearing must be conducted, and our own review

²⁷ See *Aiken County*, 725 F.3d at 269 (“No one disputes that \$11 million is wholly insufficient to complete the processing of the application.”) (Garland, C.J., dissenting).

²⁸ Aiken County squarely presented this argument to the court, but the court did not rule on this basis. See Reply Brief of Petitioners at 21-27, *Aiken County*, 725 F.3d 255 (2013) (No. 11-1271); Final Brief for the Respondents at 43-48, *Aiken County*, 725 F.3d 255 (2013) (No. 11-1271).

²⁹ See *City of Los Angeles v. Adams*, 556 F.2d 40, 49-50 (D.C. Cir. 1977) (“If Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and if Congress is silent on how to handle this predicament, the law sensibly allows the administering agency to establish reasonable priorities and classifications.”). The court cited the *Adams* case in *Aiken County*, 725 F.3d at 259. The State of Nevada would have us re-institute all aspects of the licensing process. Nevada Views at 3-5 (asserting that the licensing process mandates both the licensing and adjudicatory tracks). Under *Adams*, we do not agree that such a course of action is required and, as we discuss in the text, we do not find such an approach to constitute a wise use of limited resources.

of both contested and uncontested issues must take place.³⁰ Today we plot a course that, in our view, will advance the licensing process in a manner that is constructive and consistent with the court's decision and the resources available. We take an incremental approach, since the agency cannot engage in all of the licensing activities that we would undertake if fully funded—for example, we cannot at this time complete a formal hearing requiring disposition of nearly 300 contentions. Therefore, we looked to the schedule set forth in 10 C.F.R. Part 2, Subpart J and Appendix D and identified activities that represent the next logical steps in the process. As discussed below, we expect that the NRC Staff and DOE can accomplish these tasks with the funds currently available for work associated with the Yucca Mountain repository application. Our decision to defer other activities—in particular, resumption of the adjudication and re-constitution of the LSN—is guided by the fact that the NRC will be unable, at this time, to make meaningful or substantial progress on these fronts. Further, to resume these activities jeopardizes our ability to complete the tasks that we direct today, given the limited funds available.

Importantly, our regulations provide that the next step in the licensing process is completion of the SER.³¹ After that, the next substantial task would be completion of discovery in the adjudication.³² But, discovery cannot be completed—nor can the evidentiary hearing be held—until the SER and all necessary environmental impact statements are completed.³³ We find, then, that logic and prudence dictate completion of these review documents as the next steps in the licensing process. Similarly, in view of funding limitations, we do not today direct re-

³⁰ See 10 C.F.R. §§ 2.101(e)(8), 2.104(a), 2.1023.

³¹ 10 C.F.R. pt. 2, app. D.

³² Appendix D contemplates the commencement of discovery on “Day 100,” continuing through “Day 608,” sixty days after completion of the SER.

³³ See *generally* 10 C.F.R. pt. 2, app. D; 10 C.F.R. § 2.1022.

constitution of the LSN, in either its original form, or in a modified form. We base this determination primarily on the fact that the adjudication will remain suspended. In the absence of adjudicatory activities (particularly discovery), we do not find—and the participants do not make the case—that LSN functionalities are needed now. To be sure, and as discussed further below, public availability of the LSN collection would be a central consideration in the event additional funding is provided and the adjudication goes forward.

While our decision is not intended to call into question the requirements in 10 C.F.R. Part 2, Subpart J, those rules were not developed with the current funding situation in mind. Congress has appropriated no new funds for our review since those appropriated for Fiscal Year 2011, leaving available to us only our remaining carryover funds from previous appropriations. These carryover funds represent only a fraction of the NRC's "normal" annual budget for the Yucca review (i.e., what the agency had been spending per year prior to closing out the proceedings in 2011). Under these circumstances, we consider the amount of funding available not as a means of determining *whether* to proceed on the license application (an inquiry that the mandamus order forecloses), but in determining *how* to proceed (an inquiry that the mandamus order does not address and that prudent fiscal management requires us to consider).³⁴

The agency has in hand approximately \$11 million in unobligated carryover funding appropriated from the Nuclear Waste Fund.³⁵ DOE represents that, as of August 30, 2013, it

³⁴ Apart from the question whether Congress will provide future appropriations in future budget years, the amount of funding available to an agency under current appropriations legitimately may influence the agency's plans and priorities for the current budget year.

³⁵ Dyer, J.E., Chief Financial Officer, NRC, letter to the Honorable Rodney Frelinghuysen, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations, U.S. House of Representatives (Sept. 13, 2013) (ML13252A237). As noted in that letter, the agency has commenced using these funds to further this licensing process. The agency also has \$2.5 million in obligated, unexpended funds that would become available if contract audit activities are completed and these funds are eligible for subsequent deobligation. *See id.*

“had approximately \$15.4 million in unobligated carryover funds that could be used to support participation in the licensing proceeding,” as well as \$29.5 million in carryover funds currently obligated on existing contracts, of which \$18.1 “is obligated on contracts that are relevant and could be used” to support licensing proceedings, provided they are first de-obligated.³⁶ Bearing these amounts in mind, we direct the Staff to complete the Safety Evaluation Report associated with the construction authorization application. We also request that DOE complete the supplemental EIS needed to address the potential impacts of the construction authorization on groundwater and from surface discharges of groundwater.

1. The NRC Staff Should Complete the SER.

Regarding the SER, the Staff stated that, subject to certain assumptions, SER volumes 2 through 5³⁷ can be completed and issued concurrently in approximately twelve months after the Staff initiates work.³⁸ The Staff’s estimate for completion of the SER is approximately \$8.3

³⁶ DOE Views at 2.

³⁷ SER Volume 1 was published in August 2010. Letter from Lenehan, Daniel W., Counsel for NRC Staff, to the Administrative Judges (Aug. 23, 2010) (attaching “Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada,” Vol. 1: General Information (Aug. 2010)). SER Volume 2 concerns the review of repository safety before permanent closure; Volume 3, as noted above, concerns post-closure safety; Volume 4 concerns the staff’s review of administrative and programmatic requirements; and Volume 5 concerns license specifications and conditions. See Staff Answer Concerning Serial Case Management.

³⁸ *Affidavit of Josephine Piccone in Response to August 30 Commission Order* (Sept. 30, 2013), appended to Staff Views, ¶ 3 (Piccone Aff.). This estimate assumes: (1) no unforeseen “technical and process issues;” (2) the project “would be given a high priority so that appropriate technical staff and resources are available;” (3) no additional technical information will be required from DOE; (4) the twelve months includes time to replace and reassemble key technical reviewers, and for those reviewers to acquaint or re-acquaint themselves with relevant materials; and (5) the availability of the Center for Nuclear Waste Regulatory Analysis for contractor support. *Id.* The Staff also states that it will need access to DOE’s Licensing Support Network collection, a matter we address *infra*. Staff Views at 17-18; Piccone Aff. ¶ 3.

million.³⁹ The next significant milestone in the Appendix D schedule is issuance of the SER;⁴⁰ to conform to our regulatory scheme to the extent practicable, it makes sense to proceed with the SER as the next step in this licensing process. In addition, completion of the SER volumes is a discrete task that may be completed with existing funds, not a long-term task that would likely require substantial “orderly closure” expenditures (to facilitate orderly resumption at some future date) if Congress does not appropriate new funds before current funds are exhausted. And as the Staff observes, completion of the SER will serve multiple purposes—the Staff’s regulatory conclusions will be preserved and made publicly available, and could facilitate future resolution of contested hearing issues, if additional appropriations are provided and this licensing matter continues.⁴¹ Further, as noted above, all participants support ultimate completion of the SER. For all of these reasons, we find completion of the remaining SER volumes to be the appropriate next step in the licensing process.⁴² The Staff should complete the SER using the approach that was underway when work on the SER was suspended—that is, the Staff should work on the completion of all remaining volumes concurrently but issue each SER volume upon completion. Moreover, the release of completed volumes serially will ensure transparency as to the Staff’s activities.

³⁹ The cost of completing and issuing the SER has in the past been estimated at approximately \$6.5 million. But this cost is affected by the length of time the licensing process was suspended. See Staff Views at 9 n.28 (citing Congressional hearing transcripts).

⁴⁰ 10 C.F.R. pt. 2, app. D (“Day 548”).

⁴¹ A complete SER also may serve to inform future repository reviews or otherwise support the national repository strategy, irrespective of whether Congress appropriates more funds for our Yucca Mountain review.

⁴² Consistent with its stated commitment to comply “as expeditiously as possible with any order,” we expect that DOE will provide, to the best of its ability, any information or support requested by the Staff to facilitate timely completion and issuance of the remaining SER volumes.

2. The LSN Collection Should Be Made Available in ADAMS.

While the Staff takes no position on how we should address the availability of the LSN, the Staff represents that completion of the SER will require access to “DOE’s LSN collection and any new supplements filed prior to completion of its SER,” both as a resource for the Staff’s review and to ensure that references “in the SER are publicly available prior to publication.”⁴³

The LSN was shut down in 2011.⁴⁴ DOE’s LSN document collection (which comprises 98.8% of the LSN collection), together with the other participants’ collections, has been transmitted to the Secretary of the Commission.⁴⁵ The Secretary has been storing these materials since that time. To facilitate the Staff’s completion of the SER, and to ensure that the documents in the LSN collection currently in the Secretary’s possession are treated in accordance with agency records requirements, we direct the Secretary, in conjunction with agency records management staff, to load these documents into non-public ADAMS promptly for use by the Staff in completing the SER.⁴⁶ This course of action not only facilitates the Staff’s task, but also ensures appropriate stewardship of the collection. At this time, not all of these documents will be made publicly available because we are not certain that we will have the funds available to do so, although the Staff will make public any documents used as references in the SER, consistent with NUREG-0650, by the time the SER is issued.⁴⁷

⁴³ Staff Views at 17-18; Piccone Aff. ¶ 3 (citing “Preparing NUREG-Series Publications,” NUREG-0650, Rev. 2 (Jan. 1999), § 4.2.4.1, at 21 (“Each reference listed in an NRC publication must be publicly available.”) (ML041050294)).

⁴⁴ For a summary of the activities leading up to the LSN shutdown as well as the participants’ document preservation efforts, see *generally* CLI-11-13, 74 NRC 635 (2011).

⁴⁵ *Id.* at 637-39. The Staff did not transmit its documents to the Secretary, as they already reside in ADAMS. *Id.* at 638.

⁴⁶ We understand the cost of this effort to be approximately \$700,000.

⁴⁷ We will continue to explore means to make the collection publicly available using the limited funds available to continue the licensing process.

Based upon the Staff's representation, we expect that, during the period in which the LSN collection is being placed in non-public ADAMS, there will be a period of some weeks when the Staff will need access to documents in DOE's LSN collection that may be unavailable.⁴⁸ During that time, we encourage the Staff to call upon DOE to provide those documents. We take DOE at its word that it will use its unobligated carryover funds to support the licensing process and will make its best efforts to assist the Staff in locating necessary documents from DOE's LSN collection.

3. *DOE Is Requested to Complete the Supplemental EIS.*

As discussed in the 2008 EIS Adoption Determination Report, the Staff concluded that the discussion of certain environmental impacts in the DOE EISs, particularly the potential impacts of the proposal on groundwater and from surface discharges of groundwater, was insufficient and that supplementation was required to ensure adequacy of the EISs.⁴⁹ The Report observed that either DOE or the NRC could develop the supplement.⁵⁰ Shortly thereafter, DOE committed to prepare the supplement and provided a timeline for doing so.⁵¹ In 2009, however, DOE informed the Staff that it would not prepare a supplement, but instead provided to the NRC an analysis of post-closure groundwater impacts, together with supporting documents, for the Staff's use in preparing the supplement.⁵²

⁴⁸ Documents in the collection maintained by the Secretary of the Commission cannot be readily searched or retrieved in their current form.

⁴⁹ See 2008 EIS Adoption Determination Report, § 3.2.1.4.2.

⁵⁰ *Id.*, § 3.2.1.4.2.3.

⁵¹ Boyle, William J., Office of Civilian Radioactive Waste Management, DOE, letter to NRC Document Control Desk, "Notification of Plan for Supplementing the Final Environmental Impact Statement (FEIS)" (Oct. 3, 2008) (ML082810087).

⁵² Boyle, William J., Office of Civilian Radioactive Waste Management, DOE, letter to NRC Document Control Desk, "Notification of Change of Commitment for Supplementing the Final Environmental Impact Statement" (July 30, 2009) (ML092150301) (2009 Boyle Letter).

The Staff estimates that the EIS supplement can be prepared and issued by the NRC staff approximately twelve months after the start of work on the supplement.⁵³ This twelve-month period includes time to create a review team, collect and address public comments, and issue a draft and final supplement.⁵⁴ The Staff represents that work on the SER and the EIS supplement could be performed concurrently.⁵⁵ Alternately, the supplement could be prepared and issued by DOE and adopted by the NRC (if sufficient).⁵⁶

Here again, we find that completion of the EIS supplement is a well-defined, discrete task that would advance the licensing process and that may be accomplished with available funds.⁵⁷ Before an evidentiary hearing in this proceeding could occur, the environmental review must be completed and completion of the EIS supplement is a key component of the environmental review.⁵⁸

We request that DOE complete the EIS supplement, for consideration and potential adoption by the NRC Staff.⁵⁹ The Nuclear Waste Policy Act, Section 114(f) directs the NRC to

⁵³ See Piccone Aff. ¶ 4.

⁵⁴ Staff Views at 10-11; Piccone Aff. ¶ 4.

⁵⁵ Staff Views at 11; Piccone Aff. ¶ 4.

⁵⁶ *Id.* The Staff provided no information as to a potential schedule for DOE to develop the supplement.

⁵⁷ As with the SER, we expect that preparing the supplemental EIS now, rather than pursuing longer-term and costlier Yucca-review tasks, will limit the risk of another round of “orderly closure” expenses if current funds run out.

⁵⁸ A potential ancillary benefit of this approach, as noted by the Staff, is that completion of the EIS supplement would preserve that analysis for use in this or another repository proceeding. See Staff Views at 11.

⁵⁹ DOE has stated that it can complete the EIS supplement. See *Implementing the Nuclear Waste Policy Act—Next Steps: Hearing Before H. Energy and Comm. Subcomm. on Env’t and Econ.*, 113th Cong. 76 (Sept. 10, 2013) (statement of Dr. Peter Lyons, Ass’t Sec’y for Nuclear Energy) (“[W]e have provided the information to the NRC to do the supplement, but if they wish us to do it, we would use the information that we provided to them.”) (unofficial transcript)

(continued . . .)

adopt the DOE EIS to “the extent practicable.”⁶⁰ As described in the regulations applicable to these proceedings, DOE may be required to supplement its final EIS when there is new information “relevant to environmental concerns and bearing on the proposed action or its impacts.”⁶¹ Our regulations also provide that the presiding officer in the adjudication will determine the extent to which adoption by the NRC of any EIS—that is, DOE’s repository EIS and its supplements—is “practicable,” which in turn will satisfy our NEPA obligations.⁶² These regulations recognized that in promulgating the NWPA, Congress intended that the primary responsibility for evaluating environmental impacts rest with DOE.⁶³ As noted above, DOE already has performed significant analyses in support of the EIS supplement.⁶⁴ We therefore look to DOE to take the laboring oar in completing the environmental review.⁶⁵

4. *This Adjudication Will Remain Suspended.*

As stated above, we decline to resume the contested adjudication at this time. The schedule for these proceedings contemplates that discovery will proceed in parallel with the

(September 10 House Subcommittee Hearing Transcript). We understand that the NRC could complete an adoption decision at an estimated cost of \$600,000.

⁶⁰ NWPA § 114(f)(4); 42 U.S.C. § 10134(f)(4).

⁶¹ 10 C.F.R. § 51.67.

⁶² 10 C.F.R. § 51.109(c).

⁶³ See Final Rule, NEPA Review Procedures for Geologic Repositories for High-Level Waste, 54 Fed. Reg. 27,864 (July 3, 1989). In commenting on the proposed rule, DOE acknowledged that it was likewise responsible to supplement its EIS to account for significant new information. *Id.* at 27,867.

⁶⁴ See 2009 Boyle Letter.

⁶⁵ Consistent with the Staff’s previous practice, we expect the Staff to make public all references listed in the EIS supplement adopted by the NRC, as well as any additional references in the NRC’s adoption report.

Staff's development of the SER, with issuance of the SER by "Day 548."⁶⁶ When the proceeding was suspended in 2011, Phase I discovery had begun, and participants were in the process of scheduling depositions.⁶⁷ Our 2011 direction that the proceeding be suspended effectively tolled the Appendix D schedule. Our decision today results in a further deviation from the Appendix D schedule, in that discovery will not occur in parallel with completion of the SER.⁶⁸ We observe that the deviation is a temporary modification to our procedural rules designed to maximize progress in the overall licensing process given current funding.⁶⁹

Resuming the adjudication now likely would result in re-suspension of the case in the near term without completion of meaningful—or substantial—adjudicatory activities.⁷⁰ For

⁶⁶ See 10 C.F.R. § 2.1026(a) (requiring that, subject to exceptions not relevant here, the Presiding Officer adhere to the schedule set forth in 10 C.F.R. Part 2, Appendix D); Notice of Hearing, 73 Fed. Reg. at 63,032; CLI-08-25, 68 NRC at 504-05 (modifying the Appendix D schedule for this proceeding to revise the milestones up to, and including, the First Prehearing Order).

⁶⁷ 10 C.F.R. §§ 2.1018(b)(1), (a)(2), 2.1019. *But see* Memorandum and Order (Granting Motion for Protective Order) (May 20, 2011) (unpublished) (quashing deposition notices served on DOE by Nevada in view of the "uncertain environment surrounding this proceeding").

⁶⁸ See *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("[E]xcept upon a showing of substantial prejudice to the complaining party," "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." (citation and internal quotation marks omitted; bracket in original)); *Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2002) ("[T]he NRC possesses the authority 'to change its procedures on a case-by-case basis . . .'" (citing *City of West Chicago v. NRC*, 701 F.2d 632, 647 (7th Cir. 1983))).

⁶⁹ A key consideration to note is that proceeding on all fronts simultaneously with only a fraction of our "normal" Yucca-review budget available presumably would result in current funds running out during the middle of the current fiscal year. If this were to occur, we likely would need to expend funds putting various unfinished tasks back into a suspended state to promote an orderly resumption if and when Congress appropriates additional funds. As explained previously, a *completed* SER and EIS supplement would require no associated closeout expenditures.

⁷⁰ See, e.g., Staff Views at 16 ("resuming the adjudicatory proceeding would likely result in suspension of the proceeding before all parties have had an opportunity to fully explore, support, and ultimately receive a decision in the issues they have raised").

example, nearly 300 contentions are subject to Phase I discovery. While several participants advocated resuming the adjudication with a case management conference, none argued that it would be practical to resume the costly process of taking depositions at this time.⁷¹ In view of funding constraints, discovery activities likely would draw to an abrupt halt before significant progress can be made.⁷² In addition, the record reflects that some of the less well-funded participants do not have the resources to participate fully in the adjudication at this time.⁷³

Because we have decided not to restart the adjudication, we decline to consider the participants' various adjudicatory requests today. Should we lift the suspension in the future, participants will have the opportunity to re-submit requests associated with the conduct of the proceeding at that time. Among the questions we leave for another day is whether to reconstitute the LSN, either as it was originally implemented or in a different incarnation. As discussed above, for purposes of completing the SER, we need not reconstitute the LSN. Questions relating to how the LSN might be configured in the future, the need for, and scope of, any potential revisions to the LSN regulations in Subpart J, and how those revisions might take place—whether by case-specific order or rulemaking—would be decided at that time. In the meantime, we observe that, although the immediate purpose of putting the LSN collection into

⁷¹ See, e.g., Nevada Views at 9 (acknowledging that “prior to completion of the SER, deposition discovery must remain largely or completely suspended.”) DOE has stated that it would need approximately \$14 million to support participation in the full licensing proceeding. Brief of the United States as *Amicus Curiae* at 6-7 & n.3, *In re Aiken County*, 725 F.3d 255 (2013) (No. 11-1271).

⁷² And, as the Staff points out, discovery may be of limited utility in any event; the Board earlier in the proceeding directed that no discovery against the Staff will proceed prior to issuance of relevant SER volumes. See Staff Views at 13 (citing Case Management Order # 2 at 7).

⁷³ See White Pine County Views at 2 (“Absent additional funding being provided through appropriations . . . or other sources to White Pine County, the County will run out of carryover Nuclear Waste Funding on or about October 15, 2013 and will be compelled to terminate its Yucca Mountain oversight initiatives, including participation in the related NRC licensing proceeding, at that time.”).

ADAMS is to assist the Staff in finalizing the SER, this effort also doubles as progress toward a system the NRC would have good reason to adopt down the road—appropriations permitting—to replace the previous LSN.

C. Other Matters

1. *Renewed Motion for Recognition of the Timbisha Shoshone Tribal Council*

In 2011, we denied the Timbisha Shoshone Tribal Council's petition for review of a Board decision declining the Tribal Council's request (among others) to be recognized as the sole authorized representative of the Timbisha Shoshone Tribe in this case.⁷⁴ Given that the adjudication had been suspended, we declined to consider the appeal but indicated that, should the proceeding be reactivated at a future time, the Tribal Council could move to reinstate its petition for review.⁷⁵

The Timbisha Shoshone Tribe's views included a renewed motion for recognition, requesting that we acknowledge the Tribal Council as the appropriate party for representation of the Tribe in this proceeding.⁷⁶ Given that the proceeding remains suspended at this time, we again decline to consider the Tribal Council's motion. As we observed in CLI-11-15, however, should this adjudicatory proceeding re-commence in the future, the Tribal Council may renew its request.⁷⁷

⁷⁴ CLI-11-15, 74 NRC 815 (2011). See Order (Dismissing Timbisha Shoshone Tribal Council's Motion) (Sept. 28, 2011) (unpublished).

⁷⁵ CLI-11-15, 74 NRC at 815.

⁷⁶ Tribe Views and Renewed Motion at 2-7.

⁷⁷ For the same reason, Nevada's suggestion that we entertain petitions for review of LBP-10-22 is denied at this time. See Nevada Views at 2, 9-10. Should the adjudication resume, we will consider appeals in due course, consistent with relevant Subpart J rules. See *generally* 10 C.F.R. § 2.1015.

2. Requests for Immediate Production of the Remaining SER Volumes

Nye County, in addition to recommending that we finalize expeditiously the remaining SER volumes, requests that we make an “immediate release of even the unredacted ‘draft’ pre-decisional [SER volumes].”⁷⁸ Nye County does not claim that draft SER documents are needed for a particular adjudicatory purpose but instead cites the potential benefits to the public at large.⁷⁹ Such a request is appropriately addressed through our Freedom of Information Act (FOIA) process; Nye County may file such a request at any time. Indeed, the NRC recently received a substantially similar request, and, as a separate matter, released redacted versions of SER Volumes 2 and 3 in 2011, also in response to a FOIA request.⁸⁰

3. Budget Issues

Nye County argues that, in light of the mandamus decision, “any restoration of facilities, offices, and equipment [involved in restarting the proceedings] should be accomplished using NRC’s overall administrative budget and not the 11 million dollars available for the license adjudication.”⁸¹ As the Staff correctly observes, however, the existence of a specific appropriation for Yucca Mountain-related licensing activities (i.e., appropriations from the Nuclear Waste Fund) prevents the NRC, under well-settled principles of appropriations law,

⁷⁸ Nye County Views at 8-9.

⁷⁹ *Id.* at 9-10.

⁸⁰ See McCarthy, Justin, Judicial Watch, letter to Deborah Dennis, NRC, “Freedom of Information Act Request” (Oct. 3, 2013) (requesting, among other things, “[a]ny and all records of the NRC’s 2010 safety evaluation report [as] it relates to high level waste at Yucca Mountain”) (pending). The NRC released redacted versions of SER Volumes 2 and 3 in response to a 2010 FOIA request for those documents. See Bluey, Robert B., The Heritage Foundation, e-mail to FOIA/PA Officer, NRC (Oct. 22, 2010) (ML102950378) (requesting SER Volumes 2 and 3); NRC Final Response to FOIA 2011-0015 (Feb. 14, 2011) (ML110480651) (package).

⁸¹ Nye County Points and Authorities at 14. Nye County reiterates this point in its views (at 18).

from using its general appropriations for Yucca-related activities.⁸² The actions associated with putting assets in place, such as facilities and offices, are for the specific purpose of the Yucca Mountain licensing proceeding. Therefore, the NRC may not lawfully spend general agency appropriations on these activities.

Finally, a number of participants request that we submit to Congress a budget request that would seek appropriations for the licensing process.⁸³ We will take those requests under advisement in the course of our agency's budget process.⁸⁴

* * * * *

Concurrent with our decision today, we also provide separate direction to the Staff regarding our overarching expectations for the efficient use of available funds, as well as direction for the preparation of plans and status reports.⁸⁵ As discussed above, completion of the SER (including necessary records management activities) and adoption of the EIS supplement likely would expend nearly all of the funds currently available to the NRC, leaving only a small cushion for additional expenses given that, once completed, none of the identified activities will require any expenditure of funds for "orderly closure." Based on current cost estimates, at least, we will likely be unable to make meaningful progress on steps other than those outlined in this decision unless and until Congress appropriates additional funds for the

⁸² See NRC Staff Views at 19 n.59 (citing GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Vol. I, 2-21, GAO-04-261SP (3d ed. 2004)).

⁸³ See Four Counties Views at 2, NEI Views at 3, PIIC Views at 2.

⁸⁴ See *generally* Office of Management and Budget Circular No. A-11, "Preparation, Submission, and Execution of the Budget" §§ 22, 110 (July 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2013.pdf (explaining government-wide laws and policies regarding budget-related communications with the public and submission of budget supplements and amendments).

⁸⁵ Staff Requirements—SECY-13-0113—Memorandum and Order Concerning Resumption of Yucca Mountain Licensing Process (Nov. 18, 2013) (ML13322A007).

agency's Yucca Mountain review process. Embarking upon additional activities, and in particular, resuming the adjudication (including Phase I discovery) would jeopardize our ability to complete the tasks that, as discussed herein, constitute the next logical steps in the licensing process. We seek to maintain an adequate margin to guard against this possibility. We will closely monitor the progress of these activities,⁸⁶ and we will re-evaluate this conclusion in the event that circumstances materially change.⁸⁷

⁸⁶ See *id.* In this vein, we are also providing to Congress reports on activities and expenditure of unobligated Nuclear Waste Fund monies. See September 10 House Subcommittee Hearing Transcript at 36 (statement of Dr. Allison Macfarlane, NRC Chairman) (stating that the NRC will provide monthly updates to the Committee on Nuclear Waste Fund activities and expenditures). These reports will be made available to the public on the NRC website. See generally <http://www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2013/> (last visited Nov. 1, 2013) (providing links to Commission correspondence with Congress, including the first status report, dated October 23, 2013).

⁸⁷ NEI requests that, following SER completion, we “identify [our] budget and prepare a prioritized plan for use of [any remaining] appropriated funds,” including a timeline of all activities needed to complete the licensing process, and an estimate of resources necessary to complete those activities. NEI Views at 2. Should appropriated funds remain following completion of the activities directed in this decision, an estimate of further steps will prove necessary, and we will assess how best to use remaining funds at that time.

III. CONCLUSION

For the reasons set forth above, we *direct* the NRC Staff to complete and issue the Safety Evaluation Report associated with the construction authorization application and load the LSN document collection into ADAMS. We *request* DOE to prepare the supplemental environmental impact statement that the Staff has determined is needed to for purposes of the review of this application under NEPA. We *continue* to hold this adjudication in abeyance and *decline* to direct the Staff to reconstitute the Licensing Support Network. The Nye County and Nevada Motions are *granted in part* and *denied in part*, as discussed herein. Finally, we *decline* to decide the Tribal Council's renewed motion for recognition.

IT IS SO ORDERED.⁸⁸

For the Commission

NRC SEAL

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of November, 2013.

⁸⁸ Commissioner Apostolakis has recused himself from this adjudication and, therefore, did not participate in this matter. See Notice of Recusal (July 15, 2010).